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IN THE

Supreme Court of the United States

October Term, 1964.

No. 317

JANET MARIE CUDDY, Administratrix of the Estate of James R. Cuddy, Jr., Deceased,

Petitioner,

v.

WESTERN MARYLAND RAILWAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JANET MARIE CUDDY, ADMINISTRATRIX OF THE ESTATE OF JAMES R. CUDDY, JR., DECEASED,

Petitioner,

v.

WESTERN MARYLAND RAILWAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 4, 1964.

CITATIONS TO OPINIONS BELOW.

The Memorandum Opinion of the District Court is not yet reported and is printed in Appellant's Appendix, pp. 117a-121a. The opinion of the Circuit Court of Appeals is not yet reported and is printed in Appendix B hereto, *infra*, p. 18.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 4, 1964. It is printed in Appendix B hereto, *infra*, p. 18. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Was the plaintiff deprived of her Constitutional right to trial by jury when, after a jury found from the evidence that plaintiff's decedent was employed under the Federal Employers' Liability Act at the time of the injury which caused his death and that his death resulted, in whole or in part, from the negligence of the defendant railroad, the trial judge overruled the jury's findings of fact and entered judgment n.o.v. for the defendant?

CONSTITUTION AND STATUTE INVOLVED.

The Constitutional provision involved is Amendment VII to the United States Constitution. It is printed in Appendix A hereto, *infra*, p. 17.

The statutory provision involved is Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §51. It is printed in Appendix A hereto, *infra*, p. 17.

STATEMENT.

This is a death action under the Federal Employers' Liability Act. Federal jurisdiction is based on this Act.

On November 15, 1958, in Hagerstown, Md., plaintiff's decedent, James R. Cuddy, Jr., a locomotive engineer there employed by the defendant railroad, was shot and killed by James T. Haney, a fellow employee. He left surviving him his widow and four minor daughters. [The testimony of his widow and four daughters has been omitted from Appellant's Appendix because it relates only to damages, which are not in issue.]

Plaintiff's decedent had been called to work by the defendant for a shift commencing at 4:00 P. M. (12a, 16a). It was the practice for defendant's employees when called to work for a shift commencing at 4:00 P. M. to come to work 10 or 15 minutes early in order to be sure that they could cross the tracks and get to the caller's office on time (35a). The shooting took place between 3:40 or 3:45 and 4:00 P. M. (27a, 41a, 102a).

Immediately prior to the shooting, plaintiff's decedent was standing between a parking area located on defendant's premises and a path leading therefrom across the railroad tracks to defendant's caller's office, where defendant's employees must stop to have their time cards stamped when reporting to work (see photograph, Exhibit D-3, admitted in evidence; 14a; see also, 16a, 103a-104a, 106a-107a). At this point he was met by his father, a fellow employee, who had also been called by the defendant to report for work (16a). Not more than a minute or so after plaintiff's decedent had been joined by his father, Haney appeared on the path leading from defendant's caller's office (16a).

Haney, a fellow locomotive engineer, was working a shift for defendant that day which had begun at 8:00 A. M. and which was to terminate at 4:00 P. M. (42a). Haney

had cut off his engine for service at about 3:35 or 3:40 P. M., had gone to the caller's office (99a-100a), and then took the path across the railroad tracks toward where he had parked his car (102a-103a). Even though Haney had cut off his engine a few minutes early, he was still subject to the orders and instructions of the defendant until 4:00 P. M. (35a).

Two days prior thereto an altercation between Haney and plaintiff's decedent had occurred in defendant's caller's office (30a-31a, 33a-34a), at which time Haney had threatened to cut plaintiff's decedent with his knife (30a, 34a). Defendant had notice of this prior altercation through its Acting Caller, Spoonire (33a-34a), who was in charge of the office in a supervisory capacity for the defendant (77a-78a).

When Haney appeared in the path, he had his right hand concealed in his shirt pocket (18a, 26a). Plaintiff's decedent spoke to him and the argument continued. Plaintiff's decedent, obviously fearing that Haney was carrying a weapon to implement his pre-announced threat to do him bodily harm, called upon Haney to pull his hand out of his pocket and, upon his refusal to do so, slapped him (17a-18a, 26a). Haney then pulled his hand out of his shirt pocket, disclosing a loaded gun, and shot plaintiff's decedent (18a). The shot was fatal (9a, 67a).

Defendant's foreman, Samuel Bonebrake, testified that he had received information that defendant's employees carried guns on the job during hunting season. (Plaintiff's decedent was shot on November 15, during hunting season.) He had become foreman on January 1, 1958 (55a), and had received this information prior to the assumption of his duties as foreman (58a-59a).

Defendant's Acting Caller, Spoonire, had knowledge that defendant's employees carried guns on the job on different occasions during the hunting season and had actually seen them do so up until the time that plaintiff's decent was shot (36a).

Ira Burl Chambers, defendant's Division Superintendent at the time of the shooting, testified that while he was Trainmaster "employees got into the habit of carrying hunting guns" and that in 1953 "after the company became aware of what was going on, we passed this rule 25(h) prohibiting the carrying of firearms on engines" (76a).

Chambers testified that no inquiries were made of defendant's employees as to whether they carried guns or whether they had seen fellow employees carrying guns and no warning signs were posted in the caller's office or elsewhere and that the only step taken by the defendant was to place rule 25(h) in its timetable, hand out the timetable to its employees, and ask them to read and note the whole timetable (80a-81a).

Rule 25(h) can be found on page 26 of defendant's timetable #9 which was admitted in evidence as Exhibit D-7 (109a). The rule prohibits defendant's employees from carrying unauthorized firearms while they are on freight trains. It does not prohibit them from carrying loaded guns to and from work or while elsewhere on defendant's premises.

Foreman Bonebrake testified that, outside of the rule, he knew of no positive steps taken by him or any other railroad official relative to the carrying of guns by employees on the job (59a-60a).

Haney testified that he wasn't aware of the rule (69a).

Haney had carried the gun with which he shot plaintiff's decedent on his person to work that morning at 8:00 A. M. and had carried it with him all day (41a-42a). He had carried it with him to work on numerous prior occasions (43a). He had owned a gun previous to the gun with which he shot plaintiff's decedent and had carried that gun with him on the job on prior occasions (43a-45a). Many of defendant's employees had carried guns with them to work on various occasions during the hunting season up until the time when plaintiff's decedent was shot and killed (19a-20a, 36a, 65a).

The path along which plaintiff's decedent was shot ran from the area of defendant's caller's office to the right-angle dead-end corner where two small side streets, Elizabeth Street and Eutaw Street, met (Exhibits D-3 and D-6). Running north from this corner, between the east side of Elizabeth Street and defendant's railroad tracks, was a vacant lot. Exhibit D-6 shows, and it was testified, that this vacant lot was on the premises of the defendant railroad and was used by defendant's employees as a parking area (85a-86a, 34a-35a).

This path was the only one leading from defendant's parking area to defendant's caller's office (18a-19a). It was the most practical way to get from defendant's parking area to defendant's caller's office and it was the way normally used by defendant's employees for this purpose (113a), and had been customarily used by them for a long period of time (17a-18a, 35a, 92a). The path was located on railroad property (Exhibit D-6) and no one except railroad employees could use it without being guilty of trespassing (92a).

After a trial lasting two days, the jury returned a verdict in favor of the plaintiff in the amount of $40,000, allocating the amount of damages between the widow and her four daughters (4a). Judgment was entered on the verdict (4a). Thereafter, on December 6, 1963, the trial judge entered an order granting defendant's motion for judgment n.o.v. (122a). This order was affirmed by the United States Court of Appeals for the Third Circuit in a per curiam opinion on May 4, 1964 (Appendix B hereto, p. 18, *infra*).

REASONS FOR ALLOWING THE WRIT.

I. The Decision and Opinion Below Deprive the Surviving Widow and Her Four Minor Daughters of Their Right to Trial by Jury Guaranteed by the Seventh Amendment.

Petitioner, on behalf of the widow and daughters of plaintiff's decedent, invokes the stewardship of this Court in order to regain for them their Constitutionally protected right to a jury trial and verdict. As stated by this Court in *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 524, 76 S. Ct. 608, 100 L. Ed. 668 (1956):

> "The jury trial 'is part and parcel of the remedy afforded railroad workers under the Employers Liability Act,' . . . The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"

This Court has also held, in *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600, 602, 65 S. Ct. 545, 89 L. Ed. 490 (1945):

> "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.' *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 354."

See also, *Dice v. Akron C. & Y. R. Co.*, 342 U. S. 359, 363, 72 S. Ct. 312, 96 L. Ed. 398 (1952).

Petitioner submits that the present case is not even close or doubtful, that the negligence of the defendant railroad is patent, and that the plaintiff's Constitutionally protected right to trial by jury is deserving of the consideration of this Court.

A. *Negligence.*

In this case the jury found that the defendant railroad was negligent and that this negligence contributed, in whole or in part, to the death of plaintiff's decedent.

The trial judge, however, overruled the jury and made his own finding of fact to the effect that there was no knowledge on the part of defendant's supervisory officers of the carrying of guns by its employees on freight trains in violation of defendant's work rule 25(h), and that the defendant, therefore, was not negligent (120a-121a). In answer thereto, petitioner respectfully submits that the trial judge's finding of fact is (1) in error, (2) a non sequitur, and (3) a usurpation of the function of the jury.

The issue was broader than merely whether the defendant had knowledge that its work rule 25(h) was being violated by its employees. The real issue was whether the defendant railroad, after receiving knowledge of the dangerous habits of its employees in carrying firearms on the job, failed to take such investigatory, precautionary or remedial steps as a jury could reasonably find it should have taken in the circumstances for the protection of its employees.

The jury was justified in finding that the defendant had constructive notice that its employees were carrying guns to work. As far back as 1953, the defendant "became aware" that its employees had gotten "into the habit of carrying hunting guns" with them to work (76a). It was then that the defendant enacted its work rule 25(h). It was within the province of the jury to find that the defendant should have conducted an investigation at least once between 1953 and November 15, 1958 (the day that plaintiff's decedent was shot), in order to determine whether in fact the rule was adequate and effective to terminate this dangerous habit. If the defendant had conducted even one such investigation, it would have apprised itself of the many instances where its employees carried loaded guns

with them to work on the job (19a-20a, 36a, 43a-45a and 65a). Yet, no investigation of any kind was ever made (59a-60a, 80a-81a).

It is clear that there were many steps that the defendant could and should have taken. For example, (1) it could have conducted an investigation to find out how widespread the dangerous practice was and the identity of the employees involved; (2) it could then have disciplined the employees involved; (3) it could have warned its employees that certain of their fellow employees were carrying loaded guns on the job; (4) it could have posted signs prohibiting such conduct; (5) it could have informed the employees' union and enlisted its aid to stamp out the practice; (6) it could have enacted an adequate prohibitory work rule and given it proper publicity and enforcement.

It was within the province of the jury to find that the failure of the defendant to take any or all of these precautions constituted negligence in the circumstances under the applicable principles of the F. E. L. A., and that such negligence played some part in causing the death of plaintiff's decedent.

Moreover, with regard to rule 25(h):

(a) This rule was inadequately drafted and too narrow in scope to provide sufficient protection in the circumstances. It prohibited the carrying of loaded firearms on the job by defendant's employees only while they were actually riding on one of defendant's freight trains. It did not prohibit them from carrying loaded guns to and from work or while otherwise on the premises of the defendant;

(b) The very fact that the defendant promulgated rule 25(h) in the first place shows that the defendant recognized the danger inherent in the carrying of loaded guns to work by its employees;

(c) Defendant imprudently failed to publicize the rule. Haney, defendant's employee who shot plaintiff's decedent, was not aware of the rule (69a).

There was other significant evidence of negligence. Orville Spoonire, whom defendant's Division Superintendent admitted was a supervisory employee of defendant while in charge of defendant's caller's office (77a-78a), witnessed an altercation between Haney and plaintiff's decedent wherein Haney threatened to cut plaintiff's decedent with a knife, which altercation took place in defendant's caller's office just two days prior to the day Haney shot plaintiff's decedent (33a-34a). Spoonire knew that the altercation was so serious that plaintiff's decedent immediately attempted, without success, to contact the road foreman (34a). He also knew that defendant's employees carried guns on the job on different occasions during the hunting season, and had actually seen them do so up until the time that plaintiff's decedent was shot (36a). Yet, neither Spoonire nor any other of defendant's officials, did anything with regard to scheduling of work or otherwise to preclude or diminish the likelihood that plaintiff's decedent and Haney would meet again two days later during the changeover of work shifts, nor did they take any steps to see that Haney would not be carrying a deadly weapon at that time *in order to carry out his pre-announced threat to do bodily harm to plaintiff's decedent.*

B. *Employment.*

The jury found that plaintiff's decedent was "employed" by the defendant at the time that he was killed and that he was entitled to the protection of the F. E. L. A. The trial judge, however, relying upon a Georgia appellate court's interpretation of the Georgia Workmen's Compensation Act, overruled the jury and made his own finding to the effect that plaintiff's decedent had stopped on his way to work for the purpose of talking to Haney; that he was the aggressor in the argument which resulted in his being shot; and that he thereby broke the continuity of his employment so as to forfeit the protection of the F. E. L. A. (119a). Petitioner submits that such

finding is both in error and a usurpation of the jury's function.

The meeting between Haney and plaintiff's decedent involved no more than a verbal exchange until plaintiff's decedent noticed that Haney's hand was grasping a weapon in his shirt pocket; it was only when Haney refused to remove his hand at the request of plaintiff's decedent that violence occurred. The precipitating cause of the violence was clearly the possession by Haney of the loaded gun while leaving the job and while still on railroad time and subject to the railroad's control (35a), a situation resulting, in whole or in part, from the negligence of the defendant. At least it was within the province of the jury so to find.

Moreover, as was so aptly stated in *Lukon v. Pennsylvania R. Co.*, 131 F. 2d 327, 329 (3rd Cir., 1942), per Chief Judge Biggs:

> "The Federal Employers' Liability Act was designed to be applied liberally for the protection of railroad and other employees."

The generally recognized criterion for determining when a railroad worker is "employed" for purposes of the F. E. L. A. is simply whether his position or conduct at the time of injury was reasonably *incidental* to his employment.

See, e.g., *Virginia Ry. Co. v. Early*, 130 F. 2d 548 (4th Cir., 1942). There the plaintiff railroad employee was due at work at 7:00 A. M., but arrived at least 20 minutes early. He then went to a lunch room for coffee, the lunch room being located about ¼ mile distant from the job location. He was injured while returning from the lunch room about 10 minutes before 7:00 A. M. The Court held that he was entitled to the protection of the F. E. L. A. as a matter of law.

Since, as in the *Early* case, a railroad employee who goes ¼ mile out of his way in order to purchase coffee

before commencing work is as a matter of law entitled to coverage under the F. E. L. A., it necessarily follows that an employee who pauses momentarily to talk to fellow employees while on the direct route to his job and standing directly between a parking lot owned and maintained by the defendant company for his use and a pathway across railroad tracks also owned and maintained by the company for his use, is also entitled to the coverage afforded by the F. E. L. A. as a matter of law. At the very least, any issue concerning deviation from employment was for the jury.

See, also, *Carney v. Pittsburgh & Lake Erie Railroad Company*, 316 F. 2d 277 (3rd Cir., 1963); *Martin v. Black*, 221 F. 2d 567 (5th Cir., 1955); *Casso v. Pennsylvania Railroad Company*, 219 F. 2d 303 (3rd Cir., 1955); *Atlantic Coast Line Railroad Company v. Smalls*, 216 F. 2d 842 (4th Cir., 1954); *Healy v. Pennsylvania R. Co.*, 184 F. 2d 209 (3rd Cir., 1950); *Thompson v. Eargle*, 182 F. 2d 717 (4th Cir., 1950).

II. The Decision and Opinion of the Court Below Conflict in Principle With Applicable Decisions of This Court.

The decision of the Court below conflicts in principle with this Court's decision in *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73 (1947). There the plaintiff was a female telegraph operator who worked alone at night in a one-room frame building in defendant's railroad yard in Memphis, Tennessee. One night when she opened the door in response to a knock a man entered and attacked her. The plaintiff alleged that the defendant was negligent in failing adequately to light the building and its surroundings or to patrol or guard it. The District Court, in dismissing the complaint, held that there was no causal connection between the injury and the defendant's failure to light or guard the premises and that the law does not permit recovery 'for the intentional or criminal acts' of either a fellow employee or an outsider. The Court of

Appeals affirmed. This Court, however, reversed the judgment, holding that liability under the F. E. L. A. was a jury question. This Court stated (pp. 461-462):

> "Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

In the instant case the plaintiff proved that the defendant was aware of a dangerous condition which created a likelihood of serious physical harm to its employees, i.e., the habit that some of its employees had fallen into of carrying loaded guns to work. Petitioner submits that a railroad has every bit as much duty to take reasonable steps to protect its employees from foreseeable harm at the hands of other of its employees as it does to protect them from harm at the hands of strangers.

It is a fact of nature that man inherently possesses aggressive traits and impulses which periodically manifest themselves. It is reasonably foreseeable, if not inevitable, that employees of a railroad should have occasional arguments and disputes and altercations. They occur not uncommonly among family and friends. How much more likely are they to occur among such diverse groups of persons as railroad employees, coming as they do from greatly differing backgrounds with varied and often incompatible temperaments and personalities. It is reasonably foreseeable that someone in a fit of temper might become violent and in the heat of the moment make use of the closest weapon which he might have available.

This is why the possession of loaded guns on their persons by railroad employees on the job creates such a deadly hazardous condition. The clear foreseeability of tragic occurrences resulting therefrom is also the reason that so many governmental entities have passed laws making it illegal to carry concealed guns on one's person, and prohibiting the sale or carrying of guns without a license, and restricting the use of guns to prescribed areas.

The decision and opinion of the Court below also conflict in principle with this Court's recent decision in *Gallick v. Baltimore and Ohio Railroad Company*, 372 U. S. 108, 83 S. Ct. 659 (1963). There the plaintiff was a railroad worker who suffered injury when bitten by an unidentified insect while he was temporarily working near a pool of stagnant water located on railroad property.

Petitioner submits that the duty of a railroad to provide its employees with a safe place to work extends to providing them a place as free from inhabitation by fellow employees with concealed loaded firearms on their persons as it is free from inhabitation by bugs from a stagnant pool. Indeed, the danger inherent in the former condition is much more pronounced than in the latter one.

III. The Decision and Opinion of the Court Below Set Bad Precedent.

Although technically the only persons injured by the decision of the Court below are the widow and four minor daughters of plaintiff's decedent, the decision and opinion set a noxious precedent for cases which may arise under the provisions of the F. E. L. A. in the future.

The decision and opinion of the court below stand for the legal principle that a railroad may absolve itself from all responsibility to its employees for the known dangerous conduct of its other employees by merely enacting a prohibitory work rule and placing it unobtrusively among many other rules in its work rules booklet, without making

any attempt to ascertain whether the rule is effective or is being complied with, and that this is so even though, as in this case, the work rule is inadequately worded, is not publicized, and is not specifically called to the employees' attention. Petitioner submits that this is not the law, should not be the law, and should not be represented as the law by an extant opinion of a Federal District Court affirmed and adopted by a Circuit Court of Appeals.

The decision and opinion of the court below also stand for the legal principle that the concept of "employment" under the F. E. L. A. is equivalent to the concept of scope of employment used by the Georgia state courts in interpreting the Georgia Workmen's Compensation Act (Appellant's Appendix, p. 119a). Petitioner submits that this also is not the law, should not be the law, and should not be represented as the law by an extant opinion of a Federal District Court affirmed and adopted by a Circuit Court of Appeals.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ELWOOD S. LEVY,
Counsel for Petitioner.

July 15, 1964.

APPENDIX A.

Amendment VII to the Constitution of the United States.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section I of the Federal Employers' Liability Act, 35 Stat. 65, as Amended, 45 U. S. C. § 51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

APPENDIX B.

Opinion and Judgment of the United States Court of Appeals for the Third Circuit.

OPINION OF THE COURT.

(Filed May 4, 1964.)

Per Curiam:

On review of the record we find no error. The Order of the District Court of December 6, 1963 setting aside the jury's verdict in favor of the plaintiff and directing entry of judgment in favor of the defendant will be affirmed for the reasons so well stated by Judge Follmer in his Memorandum Opinion.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of December 6, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.